IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1845 of 1990
WITH
FIRST APPEAL NO. 2565 OF 1992
WITH
CIVIL APPLICATION NO. 7533 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

UNITED INDIA INSURANCE CO.LTD

Versus

JYOTSNABEN WD/O MADHUSUDAN SHANTILAL BHATT

Appearance:

MR DARSHAN M PARIKH for United India Insurance Co.Ltd.

MR GIRISH D.BHATT & MR ASHISH H.SHAH, for original claimants.

MR SATISH A.PANDYA, A.G.P. for D.G.P. Gujarat State.

in both the appeals and Civil Application.

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.C.PATEL
Date of decision: 27/11/98

C.A.V. JUDGEMENT : (Per : Panchal, J.)

These appeals, which are filed under section 110-D of the Motor Vehicles Act, 1939, are directed against judgment and award dated May 28, 1990 rendered by the Motor Accident Claims Tribunal (Main), Himatnagar, District : Sabarkantha in M.A.C.P. No. 439/87 and, therefore, we propose to dispose of them by this common judgment.

2. The then Chief Minister of State of Gujarat Mr. Amarsinh Chaudhary was to visit Bhiloda on June 24, 1987. Deceased Madhusudan Shantilal Bhatt, who was serving as a Police Inspector, was in piloting jeep bearing registration No. GAD-5834. The piloting jeep was being driven by police constable Mavjibhai Hiraji, who was impleaded as opponent no.1 in the claim petition. When the Chief Minister's motorcade was between Hunjh and Jagatpur, the piloting jeep in which the deceased was sitting, turned turtle, as a result of which the deceased suffered several serious injuries. As the deceased had received injuries, he was removed to Civil Hospital, Himatnagar, but his condition deteriorated and therefore, he was shifted to Civil Hospital, Ahmedabad for intensive treatment. Inspite of all the efforts made by the medical personnel, the deceased expired on June 28, 1987 at Ahmedabad. According to the appellants of First Appeal No. 2565/92, driver of the jeep was rash and negligent in driving the same, as a result of which the accident occurred and deceased died. Under the circumstances, they instituted M.A.C.Petition No. 439/87 before Motor Accident Claims Tribunal (Main) Sabarkantha at Himatnagar and claimed compensation of Rs. 3 lacs in all. The claim petition was instituted against the driver of the jeep, Director General of Police, Gujarat State and United India Insurance Co.Ltd. with which the jeep was insured.

3. The Director General of Police, Gujarat State contested the claim petition by filing written statement Exh.22. In the written statement, it was claimed by the Director General of Police that the jeep driver was never rash in driving the jeep and, therefore, claim petition was liable to be dismissed. It was also stressed therein that the driver of the jeep was driving the same at

moderate speed, but accidentally the rear tyre of the jeep had burst, as a result of which it had turned turtle and, therefore, it being an act of God, the claimants were not entitled to receive any compensation.

4. United India Insurance Co.Ltd. with which the jeep was insured, contested the claim petition by filing written statement Exh.27. By filing the written statement the Insurance Company, inter-alia, pleaded that the deceased had not died because of rash and negligent driving of the vehicle by its driver and, therefore,the claim petition was liable to be dismissed.

5. Having regard to the pleadings of parties, the Tribunal raised necessary issues for determination at Exh.29. After taking into consideration the evidence of the driver of the jeep as well as contents of the First Information Report which was lodged with reference to the accident in question and the panchnama of the place of occurrance, the Tribunal held that the accident took place because of rashness and negligence on the part of the driver in driving the jeep. Thereafter the Tribunal took into consideration the evidence led by the claimants regarding income of the deceased and deduced that the income of the deceased was Rs. 2,420/- per month at the time of accident. The Tribunal deducted a sumof Rs. 200/from the monthly income of the deceased as expenses which would have been incurred by the deceased on himself and thus, the Tribunal held that the dependency benefit of Rs. 2220/- per month i.e. Rs. 26,640/- per annum was available to the claimants. Having regard to the age of the deceased, the Tribunal was of the opinion that it would be proper to apply multiplier of 12 to the facts of the case and thus, under the head of loss of income, the Tribunal awarded a sum of Rs. 3,56,680/- to the claimants as compensation. It was noted by the Tribunal that original claimant no.1 who was the widow of the deceased,had lost consortium of husband for all time to come all of a sudden and the daughters had lost their loving father and, therefore, the Tribunal awarded a sum of Rs. 15000/- to the claimants under the head of loss of consortium. As noted earlier, after the accident the deceased was first removed to Civil Hospital, Himatnagar and thereafter to Civil Hospital, Ahmedabad. Therefore, the Tribunal awarded a sum of Rs.15,000/- to the claimants under the head of mental agony,shock and suffering. Over and above the above-referred to sums, the Tribunal granted a sum of Rs. 2000/- being expenses incurred by the claimants for obsequies of the deceased and Rs. 5000/- for medicines and other sundry expenses. Thus, the Tribunal assessed awardable compensation at Rs.

3,56,680/-. It was noticed by the Tribunal that the then Chief Minister Mr. Amarsinh Chaudhary had sanctioned a sum of Rs. 1,50,000/- to the dependents of the deceased as a measure of immediate relief. The Tribunal was of the opinion that the exgratia payment made to the dependents of the deceased by the then Chief Minister was deductible from the total compensation payable to the claimants. The Tribunal, therefore, deducted the said amount from the awardable compensation. The Tribunal also held that sum of Rs. 15000/- paid to the original claimants under the principle of 'no fault liability' was deductible from the assessed compensation. Under the circumstances, the Tribunal held that the total compensation awardable to the claimants was Rs. 1,91,680/-. In ultimate decision,the Tribunal directed the original opponents to pay jointly and severally a sum of Rs. 1,91,680/together with running interest at the rate of 12% per annum from the date of application till realisation and proportionate costs as compensation to the claimants by judgment and award dated May 28, 1990, giving rise to present appeals.

6. In First Appeal No. 2565/92, the main grievance of the appellants is that the Tribunal was not justified in deducting the sum of Rs. 1,50,000/- which was paid to the dependents of the deceased as exgratia payment by the then Chief Minister from the awardable amount of compensation; whereas in First Appeal No. 1845/90, the grievance of the Insurance Company is that the Insurance Company was liable for risk of an employee travelling in a vehicle to the extent of Rs.15,000/- only and the Tribunal was not justified in passing award of Rs.1,91,680/- with 12% interest from the date of application till realisation against the Insurance Company. In support of its claim advanced in First Appeal No. 1845/90,the United India Insurance Co.Ltd. has filed Civil Application No.7533/98 praying the Court to permit it to produce a complete copy of the policy. That application was ordered to be heard with the main appeal and, therefore, we propose to dispose of that application with these appeals. We may state that against this very judgment and award, all the three original opponents had filed First Appeal No. 2311/92 in the High Court and the Division Bench consisting of Hon'ble Mr.Justice V.H.Bhairavia and Hon'ble Mr. Justice Y.B.Bhatt had rejected the First Appeal by passing following order on February 11, 1993;-

"Leave to amend the names of the parties.
Having regard to the facts and circumstances of the case, the quantum award is just and proper.

We do not see any just reason for interference with the same. Hence, appeal is dismissed."

7. M/s.G.D.Bhatt and Ashish H.Shah,learned Counsel for the appellants in First Appeal No. 2565/92 submitted that the Tribunal was not justified in deducting sum of Rs. 1,50,000/- paid by the State Government to the original claimants as grace and, therefore, the impugned award in so far as the same is against the appellants, deserves to be modified. Elaborating the said argument it was claimed that the exgratia payment was not made towards the liability to pay compensation to be determined in future against the State Government, but it was an exgratia payment for the purpose of helping the family members of the deceased who were in distress and, therefore, the amount paid by way of grace should not have been deducted from the awardable compensation to the claimants. After referring to Exh.53, which is Government Resolution granting exgratia payment to the claimants, it was pleaded that the said amount was paid to the claimants independently of the existence of a right to claim compensation available to the claimants and, therefore, the Tribunal should not have deducted the said amount from the assessed awardable compensation. What was asserted was that the exgratia payment was voluntary, uncovenanted as well as discretionary and as it was made available with an intention to alleviate distress of family members of the deceased, it was not liable to be deducted from the amount of compensation. In support of the above-referred to submissions, learned Counsel for the appellants placed reliance on the decisions rendered in cases of (1) Perry vs. Cleaver, 1969 ACJ 363, (2) M.D.Chacko vs. N.Sreedharan and others, 1990 ACJ 439, (3) State of Himachal Pradesh v. Dole Ram, 1981 ACJ 219, (4) Shakuntala Rameshchandra Sant and others V. Rajedra D. Thakkar and another, 1994 ACJ 1147, (5) Geethakumari and others v. Rubber Board and others, 1994 ACJ 796, (6) Pallavan Transport Corporation Ltd. (Metro) v. P. Murthy and others, 1989 ACJ 413, (7) Andhra Pradesh State Road Trans. Corporation v. B.Krishnaji Rao and another, 1995 ACJ 983, (8) Raj Chopra and others v. Sangara Singh and others, 1985 ACJ 209, (9) Krishna Kapoor and others v. Himachal Road Transport Corporation, 1994 ACJ 1183, and (10) Bimla Dubey and others v. Himachal Road Transport Corporation and another, 1992 ACJ 166.

8. Mr. Darshan M.Parikh, learned Counsel for the appellants in First Appeal No. 1845/90 pleaded that as per the policy and also as per the law, liability of Insurance Company was limited to the extent of Rs.

15,000/- and, therefore, Insurance Company could not have been held responsible for any amount, except the amount of Rs. 15,000/-. It was claimed on behalf of the Insurance Company that the first page of the insurance policy was on record, but the whole policy was not produced before the Tribunal and in order to do complete justice between the parties, Court should permit the Insurance Company to produce complete copy of the policy on record. Learned Counsel for the Insurance Company further stressed that the exgratia payment was made by the State Government, who is vicariously liable for the action of the tort-feasor and, therefore, it is rightly deducted from the amount of compensation determined as payable to the dependents of the deceased. In support of his submissions, learned Counsel placed reliance on the decisions rendered in cases of (1) Pushpabai Parshottam Udeshi and others v. M/s. Ranjit Ginning & Pressing Co.Pvt.Ltd. and another, AIR 1977 SC 1735, (2) Harshvardhatiya Rudraditya (by his next friend & guardian) Govindbhai D. Parmar & Ors. v. Jyotindra Chimanlal Parikh & Anr. 1981 G.L.R. 555, and (3) National Insurance Co.Ltd. New Delhi v. Jugal Kishore and others, AIR 1988 SC 719.

9. Mr. Satish A.Pandya, learned A.G.P. submitted that exgratia payment was made by the State Government to the dependents of the deceased and, therefore, the Tribunal was justified in deducting the said amount from the awardable amount of compensation. The learned Counsel for the State Government claimed that exgratia payment is a condition of the contract of service and it is payable only on the death of the employee and as it is not a voluntary payment on charitable ground on the occasion of death, but it is an advantage by reason of death, that amount cannot be claimed by the dependent unless death of the employee occurs, as a result of which the said amount is deductible from the amount of compensation. In support of this submission, learned Counsel for the State Government placed reliance on the decisions rendered in cases of (1) Kashiram Mathur and others v. Sardar Rajendra Singh and another, 1983 ACJ 152, (2) Delhi Transport Corporation and others v. Sharda Vasudev and others, 1986 ACJ 424, (3) Raj Chopra and others v. Sangara Singh and others, 1985 ACJ 209, and (4) Gauri Bai and others v. Ramesh Kumar and others, 1994 ACJ 1044. Learned Assistant Government Pleader asserted that the plea that the liability of the Insurance Company was limited to the extent of Rs. 15,000/- was not raised in the written statement filed by the Insurance Company and, therefore, application seeking permission of the Court to produce copy of policy should

be rejected. It was stressed that one page of the policy was produced by the learned Advocate who appeared on behalf of the Insurance Comapny and in view of vague contention regarding liability having been raised in the written statement of the Insurance Company, the appeal as well as application seeking permission to produce additional evidence at the appellate stage should be dismissed.

10. In view of the rival submissions advanced at the Bar, the question which arises for consideration of the Court is whether the exgratia payment made by the State Government to the dependents of the deceased is deductible from the amount of awardable compensation ? Before answering the question posed for consideration, it would be relevant to notice the nature of exgratia payment made by the State Government to the family members of the deceased. The Government resolution Exh.53 specifically states that in order to help the family members of the deceased, it was decided to make available a sum of Rs. 1,50,000/- as financial assistance. It is relevant to note that no plea whatsoever was raised either by the driver of the jeep or by the Director General of Police that exgratia payment was payment towards compensation or that it was deductible from the amount of compensation. No issue was framed by the Tribunal as to whether the amount of exgratia payment made to the dependents of the deceased was deductible from the amount of compensation or not. The exgratia payment has a peculiar characteristic. Normally, it is conferred on the injured or the dependents of the deceased, independently of the existence of any right in him/them to receive compensation. It is made available to redress and alleviate the difficulties which may be faced by the dependents of the deceased all of a sudden. It is disposition in favour of the dependents of the deceased intended for alleviating miseries resulting from sudden accidental death of an employee. The payment of exgratia amount is not intended to compensate the dependents of the deceased. Exgratia payment cannot be obtained as of right. It is discretionary and is granted after consideration of several relevant factors. Exgratia payment is voluntary, uncovenanted as well as discretionary and cannot be enforced as of right and the only intention of making such payment is to alleviate distress of family members of the deceased. There are certain special services, aids, benefits, subventions and the like which in most communities are available to the injured or his dependents. Simple examples are hospital and pharmaceutical benefits which lighten the monetary

burden of illness. If the injured plaintiff has availed himself of these, he cannot establish or calculate his damages on the footing that he did not do so. On the other hand,there may be advantages which accrue to the injured plaintiff, whether as a result of legislation or of contract or of benevolence, which have an additional characteristic. It may be true thatthey are conferred because he is intended to enjoy them in the events which have happened. Yet they have this distinguishing characteristic, namely, they are conferred on him not only independently of the existence in him of a right of redress against others, but so that they may be enjoyed by him although he may enforce that right; they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him. If a fund is raised by subscription for the benefit of a badly injured neighbour obviously this cannot operate in relief of the liability of a man who negligently causedthe injury. So also in a contract of accident insurance, where in the absence of special stipulation the insurer will not succeed by subrogation or otherwise to the insured's right of recourse against others in the case of injury by their negligence. But for the reason given it does not follow that the negligent parties can treat the insurance as operating in relief of their liability. It was effected by the money of the plaintiff for his own benefit in the event of an accident; a benefit both independent of and cumulative upon whatever right of redress against others might arise out of the circumstances of the accident. It is evident that exgratia payment cannot be obtained as of strict right and it is granted after consideration of the position or situation in which the dependents of the deceased stand and entirely for their use and benefit and not for the use of any person antecedently liable to them to compensate them in any way. In the case of Mrs. Helen C.Rebello & Ors. v. Maharashtra State Road Transport Corporation & another, Judgement Today, 1998(6) S.C. 418, the question which was considered by the Supreme Court was whether the amount received by the heirs of the insured under a Life Insurance Policy, is deductible from the amount of compensation or not. After reviewing the law on the subject, the Supreme Court has held that the amount received under the life insurance policy has no co-relation to the compensation computed under the provisions of the Motor Vehicles Act, 1939, as heirs received the amount under the Act without any contribution. What is emphasised by the Supreme Court is that compensation payable under the Motor Vehicles Act would not include that which heirs of the deceased would have received on account of other form of deaths even

apart from accidental death. The pertinent observations made by the Supreme Court are as under :-

"35. Thus, it would not include that which claimant receives on account of other form of deaths, which he would have received even apart from accidental death. Thus, such pecuniary advantage would have no corelation to the accidental death for which compensation is computed. Any amount received or receivable not only on account of the accidental death, but that would have come to the claimant even otherwise, could not be construed to be the 'pecuniary advantage', liable for deduction. However, where the employer insures his employee, as against injury or death arising out of an accident, any amount received out of such insurance on the happening of such incidence may be an amount liable for deduction. However, our legislature has taken note of such contingency, through the proviso of Section 95. Under it, the liability of the insurer is excluded in respect of injury or death, arising out of, in the course of employment of an employee.

36. This is based on the principle that the claimant for the happening of the same incidence may not gain twice from two sources.This, it is excluded thus, either through the wisdom of legislature or through the principle of loss and gain through deduction not to give gain to the claimant twice arising from the same transaction,viz. same accident. It is significant to record here in both the sources viz. either under the Motor Vehicles Act or from the employer, the compensation receivable by the claimant is either statutory or through the security of the employer securing for his employee but in both cases he receives the amount without his contribution. How thus an amount earned out of one's labour or contribution towards one's wealth, savings, etc. either for himself or for his family, which such person knows, under the law, has to go to his heirs after his death either by succession or under a Will could be said to be the 'pecuniary gain' only on account of one's accidental death. This even otherwise than the accidental death. No co-relation between the two. Similarly, life insurance policy is received either by the

> insured or the heirs of the insured on account of the contract with the insurer, for which insured contributes in the form of premium. It is receivable even by the insured,if he lives till maturity after paying all the premiums, in the case of death insurer indemnifies to pay the sum to the heirs, again in terms of the contracts for the premium paid. Again this amount is receivable by the claimant not on account of any accidental death, but otherwise on insured's death. Death is only a step or contigency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no co-relation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction. When we seek the principle of loss and gain, it has to be on similar and same plane having nexus inter se between them and not to which, there is no semblance of any co-relation. The insured (deceased) contributess his own money for which he receives the amount has no co-relation to the compensation computed as against of course, is a pecuniary gain but how this is equitable or could be balanced out ofthe amount to be received as compensation under the Motor Vehicle Act. There is no co-relation between the two amounts. Not even remotely. How can an amount of loss and gain of one contract could be made applicable to the loss and gain of another contract. Similarly, how an amount receivable under a statue has any co-relation with an amount earned by an individual. Principle of loss and gain has to be on the same place within the same sphere, of course, subject to the contract to the contrary or, any provisions of law."

11. We note that exgratia payment was not made to the dependents of the deceased only because the deceased died in a motor accident. The compensation payable under the Motor Vehicles Act is on account of the pecuniary loss to the claimants by accidental injury or death and not other forms of deaths. The exgratia payment can be made if there is natural death or death by suicide, serious illness,including even death by accident through train, air flight not involving motor vehicle and such payment

would not be covered under the Motor Vehicles Act.

12. In SHAKUNTALA RAMESHCHANDRA SANT AND OTHERS (Supra), Trial Court had deducted exgratia payment made to the dependents of the deceased. While reversing that part of the order it was held as under:-

> "Exgratia payment made by the Company cannot be taken into account for these are payments made having regard to the pitiable condition in which the widow and children of Rameshchandra have been left consequent to the mishap which took away the sole bread-winner of the family. Exgratia payment so made cannot be adjusted as if it were on the credit side of the tortfeasor."

In the case of GEETHAKUMARI AND OTHERS (Supra), the High Court considered the question whether any deduction on account of gratuitous payment received by the legal representatives of a deceased employee is admissible. Kerala High Court has answered the said question in the following terms :-

> "Accordingly, we hold that no portion of the pension, insurance money, gratuity, provident fund or any gratuitous payment received by the legal representatives of a deceased employee can be deducted from the amount of compensation payable to them under the Motor Vehicles Act. So also the salary or any part thereof which may be payable to the widow for the employment given to her on compassionate grounds on account of her husband's death cannot be deducted from the compensation payable to her under the Motor Vehicles Act. No part of the income that the widow or other legal representatives may be getting from any business or profession, whether it is a continuation of the business of the deceased or a new business started by them, can be deducted from such compensation."

This question also came-up for consideration of Madras High Court in PALLAVAN TRANSPORT CORPORATION LTD. (Metro) (Supra). The question considered was whether deduction on account of amount received under family benefit scheme and ex gratia from the Chief Minister's relief fund is admissible. The Tribunal had deducted sum received by the dependents of deceased Vijayan from the Government under the family benefit scheme and under the

Chief Minister's relief fund. While reversing that decision of the Trial Court, High Court held as under :-

"On behalf of the claimants, it is contended that the Tribunal erred in deducting Rs. 10,000/received from the Government under the family benefit scheme and Rs. 1000/- from the Collector of Madras under the Chief Minister's relief fund, which is an ex gratia payment. There is force in this contention since the family benefit scheme and the ex gratia payment are available to all Government servants who die while they are in service. This has nothing to do with the accident, whereas the compensation to be awarded under the provisions of the Motor Vehicles Act relates to the damages caused on account of the accident. Further the compensation amount represents the loss which the tortfeasor had caused to the estate of the deceased. Deducting the abovesaid amounts from the amount of compensation arrived at will amount to relieving the tortfeasor of his liability. The amount payable under the family benefit scheme and the ex gratia payment are not intended for such purpose. Therefore, the Tribunal is not right in deducting the amount received under the family benefit scheme and the ex gratia payment from the amount awarded towards compensation."

The Andhra Pradesh High Court in the case of ANDHRA PRADESH STATE ROAD TRANS. CORPORATION (Supra) has also considered the question whether deduction on account of ex gratia payment made voluntarily by the tortfeasor is admissible ? There also the Tribunal had deducted sum paid by Road Transport Corporation as ex gratia. The Andhra Pradesh High Court has expressed the view that tortfeasor cannot claim benefit of deduction of the amount paid voluntarily by either himself or by somebody.

The Himachal Pradesh High Court in the case of KRISHNA KAPOOR AND OTHERS (Supra) has held that deduction on account of ex gratia payment is not admissible. While negativing the plea raised on behalf of Himachal Pradesh Transport Corporation that the interim relief granted to the claimants as ex gratia amount should be deducted from the entire amount of compensation. Himachal Pradesh High Court has held that such sum is not deductible in view of decision rendered in the case of BIMLA DUBEY (Supra).

In RAJ CHOPRA AND OTHERS (Supra), the Punjab and

Haryana High Court has held that ex gratia payment made to the claimants cannot be deducted from the compensation awarded. In the said case, a sum of Rs. 10,000/- had been paid to the claimants as ex gratia payment on account of accident. The Insurance Company had pleaded that the said sum was liable to be deducted from the compensation payable. While negativing the said contention, the Punjab and Haryana High Court has held as under :-

"A contention was raised by Mr. V.P.Gandhi, counsel for the insurance company, with which the truck had been insured that as Rs. 10,000/- had been paid to the claimants as ex gratia payment on account of this accident, this sum be deducted from the compensation payable. He sought to rely upon the judgment of the Full Bench in Bhagat Singh Sohan Singh v. Om Sharma, 1983 ACJ 203 (P & H). This authority lends no support for the proposition that such payment deserves to be deducted as claimed by the counsel for the insurance company. On the contrary, it provides otherwise. It being observed therein, "Sums of money paid as private or public benevolence, have on principle been rightly excluded because their benefactors could never intend that their munificence should go to the tortfeasor and not to the deceased victim or his dependents." To buttress this position support was taken from what Lord Reid said in the House of Lords in Perry v. Cleaver, 1969 ACJ 363 (HL, England):

"It would be revolting to the ordinary man's sense of justice and therefore, contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrong doer....."

The Himachal Pradesh High Court in the case of STATE OF HIMACHAL PRADESH v. DOLE RAM (Supra) has ruled that ex gratia payment to the claimants made by the Government cannot be deducted for the purpose of calculating compensation under the provisions of the Motor Vehicles Act, 1939.

13. Reverting back to the authorities cited by the learned A.G.P., we find that in KASHIRAM MATHUR AND

OTHERS (Supra), the Madhya Pradesh High Court has taken the view that exgratia payment is a condition of contract of service and it is payable only on the death of employee. What is emphasised by the Court therein is that it is not a voluntary payment on charitable ground on the occasion of death, but it is an advantage by reason of death and therefore, this amount cannot be claimed by the dependents unless death of employee has occurred and so, this amount is deductible from the amount of compensation.

However, the Madhya Pradesh High Court in the case of GAURI BAI AND OTHERS (Supra) has taken the view that deduction on account of ex gratia payment received by the claimants is not admissible. In the said case, the claimants were found to have received ex gratia payment of Rs. 2500/- on account of death of deceased Manbahadur. The Claim Tribunal had made deduction of this amount from the amount determined as compensation. It has been held therein that such amount of ex gratia payment could not have been deducted from the amount payable to the legal representatives of the deceased and accordingly, the award was modified to that extent. Moreover,in the present case reference to Exh.53 makes it very clear that the payment was made voluntarily on charitable ground on the occasion of death of the deceased and, therefore, decision rendered in case of KASHIRAM MATHUR AND OTHERS (Supra) is of no help to the learned Assistant Government Pleader.

The Delhi High Court in DELHI TRANSPORT CORPORATION AND OTHERS (Supra) has taken the view that the amount paid by the employer of the deceased as compensation for death on duty is deductible from the amount of compensation assessed. In the said case, amount of Rs. 38,000/- was paid by the employer towards compensation for the death of the deceased and, therefore, it has been held that the said amount was deductible from the compensation assessed.

14. We may note that the decisions rendered in the cases of (1) KASHIRAM MATHUR AND OTHERS (Supra), (2) GAURI BAI AND OTHERS (Supra) and (3) DELHI TRANSPORT CORPORATION AND OTHERS (Supra) are merely persuasive in nature and not at all binding on this Court. Exgratia payment is a collateral benefit which cannot be deducted from the award of damages. Whatever comes to the heirs or dependents of the deceased as a colateral benefit cannot be debited in the balancesheet of a gain and loss arising by the reason of the death from the accident. Further the governing principle is that the damage

recoverable must be directly contributable to the tort and no more and that is why what is to be deducted must be intrinsically the same. What was not in pari materia could not be deducted. In general matters which are collateral, being res inter alios actae, are not taken into consideration in assessing damages for breach of contract or in tort in mitigation of damages and, therefore, no account is taken of benefits under insurance policies affording cover against personal injuries when damages are assessed for negligence causing such injuries. There are two classes of cases where a sum given to the plaintiff as a result of the accident, but which would not have come to him but for the accident, are disregarded: (i) proceeds of insurance, and (ii) sums given to him by reason of benevolence. The amount of benevolence is disregarded for the reason that, springs of private charity would get dried up if such amounts went for the benefit of the tortfeasor. The Tribunal committed error in deducting Rs. 1,50,000/paid to the dependents of the deceased from the then Chief Minister's relief fund. Before a wrongdoer or person vicariously liable can urge with any emphasis that certain deductions should be effected from the compensation amount which is made payable by him to the dependents of the deceased victim, a very heavy onus lies on him to show how these deductions fall within the excepted categories of payments which can be deducted from such compensation. Thus, before any amount is held to be a permissible deduction from the compensation amount, it will have to be demonstrated by the wrongdoer that this amount had any direct connection or linkage with the death of the victim and that it was not in the nature of payment of compensation by way of accident insurance or that it was not a voluntary payment made to his dependents ex gratia. Here in this case, admittedly, it is established that payment of amount of Rs. 1,50,000/is in the nature of ex gratia or benevolent payment which the State had effected in favour of the dependents of the deceased who died in harness. It is not unknown that in case of accidental death, ex gratia payments are made by the State to the dependents of one who dies in harness. Having regard to the nature of payment, we are of the view that it does not fall within the permissible deductions from the compensation amount. Therefore, First Appeal No. 2565/92 filed by the original claimants will have to be allowed.

15. Learned Counsel for the original claimants pleaded that the total compensation payable was assessed by the Tribunal at Rs. 3,56,680/- and, therefore, after deducting the sum of Rs. 15,000/-, which was paid to the

claimants under the principle of "no fault liability", rest of the amount should be directed to be paid to the claimants as compensation. It was stressed that though the claim was confined to Rs. 3 lacs, the awardable compensation was determined to be Rs. 3,56,680/- by the Tribunal and as the Tribunal has jurisdiction to award more compensation than the amount claimed, an award for Rs. 3,41,680/should be passed in favour of the claimants. In support of this submission of his, the learned Counsel placed reliance on the decisions rendered in (1) NEW INDIA ASSURANCE CO.LTD. vs/ G.LAKSHMI AND OTHERS, 1996 ACJ 1068, (2) SHARIFUNNISA AND OTHERS vs. BASAPPA RAMCHANDRA DATE AND OTHERS, 1986 ACJ 792, (3) KELA DEVI AND ANOTHER v. RAM CHAND AND OTHERS, 1986 ACJ 818, and (4) DAYALI BAI AND OTHERS v. STATE OF RAJASTHAN AND ANOTHER, 1993 ACJ 1211.

16. In our view, the claimants cannot be awarded compensation more than the amount claimed in the claim petition and, therefore, the submission that compensation assessed by the Tribunal should be paid to the claimants will have to be rejected. It is true that in the decisions relied on by learned Counsel for the claimants, a view has been expressed that as the Tribunal has to determine just compensation, the Tribunal can award compensation more than the amount claimed in the claim petition. However, so far as this Court is concerned, this point is no more res intergra and it is settled by earlier decisions that compensation more than the claimed cannot be awarded. In the case of Babu Mansa v. Ahmedabad Municipal Corporation and ors., 19 GLR 492, the Division Bench comprising Hon'ble Mr.Justice P.D.Desai (as he then was) and Hon'ble Mr.Justice M.K.Shah, considered the question whether on the true assessment of the evidence led at the trial, the claimants can be awarded higher amount than that claimed under one particular head. The said question has been answered by the Division Bench in following terms in para-24 of the reported judgment:-

> "24. It is true that in the claim application the compensation claimed by the appellant under this head was confined to Rs.1000/-. However,so long as the total amount to be awarded does not exceed the total amount claimed, there should be no objection in awarding higher amount than that claimed under one particular head, if on the true assessment of the evidence led at the trial, the claimant is found entitle to be same. In an application for compensation made under sec. 110(1) of the Motor Vehicles Act, 1939 read with

> Rule 291 of the Bombay Motor Vehicles Rules, 1959 and the prescribed form Comp. A, the relevant particular which the claimant has to set out relates to the quantum of compensation and basis thereof. The basis has to be broadly indicated on estimates. Besides, heads of compensation have to be regarded separately as aids to reaching a just amount. The Tribunal's power to award just and proper compensation is, therefore, not fettered by the specification of an amount in the claim application under any head. We are supported in the view which we are taking by the decision in Bail Nada v. Shivabhai, VIII G.L.R. 662. It was there held atpage 691 that once loss under both the heads comprised in secs. 1A and 2 of the Fatal Accidents Act, 1855 has been claimed and so long as the amount awarded does not exceed the amount claimed, the amount awarded can be suitably split up and awarded under the said two sections. The same principle will apply in cases of personal injury. So long as the award does not exceed the total amount claimed, there should be no objection in splitting it up under different heads and even if a specific amount is claimed under a particular head, the Tribunal has the power to award an excess amount under that very head without amendment of the claim application provided the evidence justifies it."

As is evident, in the above-referred to case, Division Bench while propounding the principle that compensation more than what is claimed cannot be awarded, relied on the decision rendered in the case of Bai Nanda, wd/o Bhoi Shana Kalyan and others vs. Patel Shivabhai Shankerbhai and others, 7 G.L.R. 662. The Court in case of Bai Nanda (supra) was concerned with the question of computing loss to the estate of the deceased. In the said case, it was argued on behalf of the respondents that there was no specific claim under the said head in the claim petition and, therefore, claimants were not entitled to compensation under the head of loss to the estate of the deceased. While negativing the said contention, Division Bench comprising Hon'ble Mr. Justice J.B.Mehta (as he then was) and Hon'ble Mr.Justice M.U.Shah, has held that the claim claimed by the dependents as heirs of the deceased was not only for their maintenance,marriage, education, clothing etc. but was also for compensation on account of premature death of the deceased resulting in mental agony and forced widowhood. The Division Bench has observed on page 691 of the reported decision that the claim clearly included

loss under both the heads and so long as the amount awarded did not exceed the amount claimed, the amount awarded could be suitably split up and awarded under the two sections 1-A and 2 of Fatal Accidents Act, 1855. From the above-referred to two decisions of our High Court it is clear that so long as the total amount to be awarded does not exceed the total amount claimed, there should be no objection in awarding higher amount than that claimed under one particular head, if on the true assessment of the evidence led at the trial, the claimant is found entitled to the same. In an application for compensation made under section 110(1) of the Motor Vehicles Act, 1939 read with Rule 291 of the Bombay Motor Vehicles Rules, 1959 and the prescribed Form, the relevant particular which the claimant has to set out relates to the quantum of compensation and basis thereof. The basis has to be broadly indicated on estimates and though the Tribunal has power to award just and proper compensation, it does not mean that the Tribunal can award compensation more than what is claimed in the claim petition. Here, in the facts of the case, it is relevant to note that the claim was confined to Rs. 3 lacs. No amendment application was moved by the claimants before the Tribunal seeking permission to enhance the claim. Court fees were also paid by the claimants on the basis that their claim was Rs. 3 lacs. In Director General, Indian Council of Agricultural Research and others, 1987 ACJ 152, the Division Bench of Kerala High Court has expressed the view that Court cannot award compensation in excess of the amount claimed in the claim petition. Again, in Fizabhai and others v. Nemichand and others, AIR 1993 M.P. 79, the Division Bench of Madhya Pradesh High Court has taken the view that though the compensation claimed need not be itemised, but the total figure of compensation claimed should be mentioned in the claim petition. What is emphasised therein is that the limitation in such cases should be that the Claims Tribunal should not award compensation exceeding the total figure of compensation mentioned in the application. Though this question is not specifically dealt with or decided by the Supreme Court, we notice that in case of Adikanda Sethi (dead) through Lrs & Anr. v. Palani Swami Saran Tranports & Anr., Judgment Today 1997(5) S.C. 494, the Supreme Court on assessment of evidence concluded that the claimants were entitled to get Rs. 1,40,000/- towards compensation, but as the claim was limited to Rs. 1 lac, the Supreme Court held that the claimant would be entitled to get Rs. 1 lac as compensation with interest. We are in respectful agreement with the view expressed by two Division Benches of this Court and we hold that the present claimants will

not be entitled to more compensation than claimed, though the compensation found payable by the Tribunal is more than what was claimed in the claim petition. Therefore, this submission advanced on behalf of the claimants fails and the same is hereby rejected.

17. Coming to First Appeal No. 1845/90 filed by United India Insurance Co.Ltd. we find that the Tribunal has held insurance company also liable for the award. The Tribunal has not gone into the question as to what was the extent of liability of the Insurance Company. The first page of the insurance policy was produced on the record of the case to indicate that the vehicle involved in the accident was insured with the Insurance Company and, therefore, the Insurance Company has filed Civil Application to permit it to produce complete policy on the record of the case, which is opposed by the State Government. When the Claim Petition is filed in motor vehicle accident, Insurance Company must produce policy for doing justice between the parties. The attitude of not filing copy of policy of the insurance and producing only first page of the policy can hardly be justified. The Supreme Court has consistently emphasised that it is the duty of party which is in possession of the document which would be helpful in doing justice in cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of the State Government and the instrumentality of the State who are under an obligation to act fairly. In all cases, where Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence. However, the State Government should also have produced the copy of policy to enable the Tribunal to do complete justice between the parties. In National Insurance Co.Ltd. New Delhi v. Jugal Kishore and others, AIR 1988 SC 719, the policy of insurance was not produced for consideration of the Court. The Supreme Court perused the photostate copy of the policy to ascertain whether the risk for any amount higher than the amount contemplated by clause (b) of Section 95(2) was covered. Having regard to the facts of the case, we are of the view that insurance policy should be permitted to be brought on record of the case so as to do complete justice between the parties. Under the circumstances, Civil Application is allowed and permission is granted to the Insurance Company to produce copy of policy on the record of the case. Placing reliance on the contents of the policy, it was sought to be pleaded that Insurance Company is not liable where

such death or injury arises out of and in the course of employment of such persons by the insured. In NEW INDIA ASSURANCE CO. LTD. v. THAKOR BHEMAJI GANESHJI AND OTHERS, 1993 ACJ 630, Full Bench of this Court has held as under :-

"7. Sub-section (2)(b) of section 95 contemplates the liability in respect of passengers carried in a vehicle, which would fall into 2 categories:

(i) passengers carried for hire or reward;

(ii) passengers carried by reason of or in pursuance of a contract of employment.

When a limit of Rs. 50,000/- was laid down in sub-clause (i), the legislature excluded the passengers carried for hire or reward, but not other persons carried in the vehicle or third parties who were victims of the accident. It specifically provides that the policy of insurance shall cover any liability, in respect of persons other than passengers carried for hire or reward. This clause, therefore, would naturally include passengers carried in a vehicle by reason of or in pursuance of a contract of employment. This would be a perfectly natural and literal interpretation of sub-clause (i). Sub-clause (ii) speaks of 'passengers' without referring to the category in which they fall. However, when the category of 'passengers carried for hire or reward' is specifically excluded in sub-clause (i), that sub-clause would cover all other persons including the passengers carried in the vehicle by reason of or in pursuance of the contract of employment. Moreover,sub-clause (ii) does not speak of the remaining type of passengers in order to distinguish it from sub-clause (i). Therefore, by implication it would mean that sub-clause (ii) applies to passengers carried for hire or reward.

9. We, therefore, are of the view that while deciding the case of Hansa Visanji Rana, 1988 (2) TAC 135, the later Division Bench proceeded on an unwarranted assumption that sub-clause (i) of section 95(2) (b) prescribed the limit for third parties only and it erroneously held that persons

> carried by reason of employment would be recovered by sub-clause(ii). We agree with the view taken by the earlier Division Bench in the case of Ganchi Ramanlal Kantilal, 1979 ACJ 65 (Gujarat), which even without referring to sub-clause (ii) had taken the correct view by impliedly determining the liability for such employees under sub-clause (i). In Sheikhupura Transport Co.Ltd. v. Northern India Transporters Insurance Co.Ltd. 1971 ACJ 206 (SC) also, on which the later Division Bench placed reliance, the Supreme Court had also to deal with the case in which passengers of a passenger bus belonging to the appellant transport company died onthe spot because of the accident. The Supreme Court dismissed the appeals of the transport company by holding that the maximum liability per passenger was indicated by the limit in respect of the vehicle with different seating capacities as per clause (b) of sub-section (2) of section 95 before the amendment in 1982. The later Division Bench has also referred to the Supreme Court judgment in Pushpabai's case, 1977 ACJ 343 (SC), wherein the Supreme Court in the context of a passenger travelling gratis held that a policy of insurance was not required unde sub-clause (ii) of section 95(2)(b) to recover risk to the passengers who were not carried for hire or reward. Neither the judgment in Sheikhupura Transport Co. (supra) nor in Pushpabai (supra) lays down that the liability for employees carried pursuant to the contract of employment would not be covered by sub-clause (i) of sub-section (2) (b). This would be the correct interpretation of section 95(2)(b)(i) of the Act."

In view of what has been laid down in above referred to case, the submission that risk of the deceased was not covered by the Insurance Policy and, therefore, Insurance Company is not liable to satisfy the award, cannot be accepted. However, in view of the provisions of Section 95(2)(b)(i) liability of the Insurance Company would be Rs. 50,000/in all because the vehicle was the vehicle in which the deceased was carried by reason or in pursuance of contract of employment. Therefore, the submission that the liability of the Insurance Company would be limited to the extent of Rs. 15,000/- also cannot be accepted. Under the circumstances, we hold that the liability of the Insurance Company is Ra. 50,000/- in all and the

Tribunal was not justified in holding that the Insurance Company is liable to satisfy the whole award passed against the driver of the jeep and the Director General of Police, Gujarat State. Therefore, First Appeal No. 1845/90 deserves to be allowed partly.

For the foregoing reasons, Civil Application No. 7533/98 is allowed with no order as to costs. First Appeal No. 2565/92 is also allowed; whereas First Appeal No. 1845/90 is partly allowed. It is held that the opponents No.1 & 2 in First Appeal No. 2565/92 are liable to pay total compensation of Rs. 3 lacs with 12% interest from the date of application till realisation with proportionate costs. It is further held that the liability of the Insurance Company is limited to Rs. 50,000/- with interest at the rate of 12% per annum from the date of filing of the application till realisation and proportionate costs. The opponents no.1 & 2 in First Appeal No. 2565/92 are directed to deposit the additional amount of compensation in the Tribunal within two months from the date of receipt of writ,failing which they shall be liable to pay interest at the rate of 15% per annum on the amount of additional compensation. The amount of compensation paid by the Insurance Company in excess of Rs. 50,000/- shall be refunded by the opponents no.1 & 2 of First Appeal No. 2565/92 within two months from the date of receipt of the writ. First Appeal No. 2565/92 is allowed with costs; whereas there shall be no order of costs in First Appeal No. 1845/90.

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(patel)